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# In the Supreme Court of the United States

October Term, 1982

No._____

DAVID H. MOFFET, JR. and JOHN HURSTON

Petitioners,

vs.

STONE MOUNTAIN MEMORIAL ASSOCIATION, GEORGE M.D. (JOHN) HUNT, III, SUSAN W. ANTHONY, ZELL MILLER, DAVID B. POYTHRESS, W. MILTON FOLDS, JOHN W. LONG, T. STEPHEN JOHNSON, GEORGE J. WILLIS, EUGENE I. PETERSON, and "JOHN DOE",

Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

(1) Where an instrumentality of a state promulgates a merit system which grants its employees job tenure, during satisfactory job performance, may the State instrumentality eliminate and revoke this property right, without complying with procedural or substantive constitutional due process?

(2) Where a written merit system agreement contains a phrase authorizing amendments, are property rights granted by the merit system subject to being "amended away" without substantive or procedural constitutional due process?

(3) Where a Court of Appeals has, by a per curiam (without written comment) opinion, effectively sanctioned the non application by a United States District Court of statutory rules of interpretation of words and phrases used in contracts, which has the effect of ignoring the usual and ordinary meaning of the word "amend",

does such call for Supreme Court power of supervision as contemplated by Rule 19?

(4) Where the United States Supreme Court in the case of Phillips Petroleum Co., et al., v. Jenkins, 56 S. Ct. 611, 297 U.S. 629, has interpreted the reservation of the right to amend to be limited and not to authorize the revocation of the principle purpose of a contract, is employment job tenure during satisfactory job performance such a principle purpose of a merit system contract as to be encompassed by the Supreme Court ruling?

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STONE MOUNTAIN MEMORIAL ASSOCIATION, GEORGE M.D. (JOHN) HUNT, III, SUSAN W. ANTHONY, ZELL MILLER, DAVID B. POYTHRESS, W. MILTON FOLDS, JOHN W. LONG, T. STEPHEN JOHNSON, GEORGE J. WILLIS, EUGENE I. PETERSON, and "JOHN DOE",

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH UNITED STATES COURT OF APPEALS

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

DAVID H. MOFFET, JR. and JOHN HURSTON, the Petitioners herein, pray that a Writ of Certiorari issue to review the Order and Judgment of the United States District Court for the Northern District of Georgia entered in the subject case and affirmed per curiam (without written comment) by The United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The unreported Order and Judgment of the United States District Court for the Northern District of Georgia dated April 29, 1981, is printed in Appendix hereto, page A1 through A21. The unreported per curiam (without written comment) opinion of The United States Court of Appeals for the Eleventh Circuit, dated March 16, 1982, affirming the District Court Order and Judgment, is printed in Appendix hereto, page A22. The unreported denial of Petition for Rehearing by The United States Court of Appeals for the Eleventh Circuit is dated April 21, 1982, and is printed in Appendix hereto, page A23,24.

## JURISDICTION

The Judgment of the United States District Court for the Northern District of Georgia ( See Appendix , page A21) was entered on the 29th day of April, 1981. A timely Petition for Appeal was filed. The United States Court of Appeals for the Eleventh Circuit on March 16, 1982 affirmed the judgment per curiam ( without written comment) (See Appendix, page A22). A timely Petition for Rehearing was denied on April 21, 1982 (See Appendix, page A23,24). The jurisidiction of the United States Supreme Court is proper in this case as provided under Title 28, §1254 of the United States Code. Petitioners maintain that their constitutional rights of the due process of law and equal protection of law guaranteed the Fourteenth Amendment to the United States Constitution has been violated by Respondents under color of state authority which is actionable under Title 42, §1983 of the United States Code. Further, Petitioners maintain that the judgment of the District Court, and its affirmation by the

United States Court of Appeals for the Eleventh Circuit, per curiam (without written comment), is in conflict with a decision the United States Supreme Court rendered in the case of Phillips Petroleum Co. et al., v. Jenkins, 56 S.Ct. 611, 297 U.S. 629.

## QUESTIONS PRESENTED FOR REVIEW

(1) Where an instrumentality of a state promulgates a merit system which grants its employees job tenure, during satisfactory job performance, may the State instrumentality eliminate and revoke this property right, without complying with procedural or substantive constitutional due process?

(2) Where a written merit system agreement contains a phrase authorizing amendments, are property rights granted by the merit system subject to being "amended away" without substantive or procedural constitutional due process?

(3) Where a Court of Appeals has, by a per curiam (without written comment) opinion, effectively sanctioned the non application by a United States District Court of statutory rules of interpretation of words and phrases used in contracts, which has the effect of ignoring the usual and ordinary meaning of the word "amend",

does such call for Supreme Court power of supervision as contemplated by Rule 19?

(4) Where the United States Supreme Court in the case of Phillips Petroleum Co., et al., v. Jenkins, 56 S. Ct. 611, 297 U.S. 629, has interpreted the reservation of the right to amend to be limited and not to authorize the revocation of the principle purpose of a contract, is employment job tenure during satisfactory job performance such a principle purpose of a merit system contract as to be encompassed by the Supreme Court ruling?

## CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioners assert that the following are involved in this action:

1.

Section 1, Amendment Fourteen to the Constitution of the United States of America.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprieve any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2.

United States Code Title 42, §1983, Civil Action for Deprivation of Rights.

> "Every person, who under the color of any statute, ordinance, regulation, custom, or usage of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress."

3.

United States Code Title 28, §1343, Civil Rights and Elective Franchise:

"The District Courts shall have original jurisdiction of any civil actions authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunities secured by the Constitution of the United States or any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

4.

United States Code Title 28, §1254, Courts of Appeal; Certiorari; Appeal; Certified Questions.

"Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendention of judgment or decree;"

5.

Code of the State of Georgia §20-704 Rules of Interpretation Sections (2) and (5):

"2. Words generally bear their usual and common signification; but technical words, or words of art, are used in a particular trade or business will be construed generally, to be used in reference to this particular meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties."

"5. If the construction is doubtful, that which goes more strongly against the party executing the instrument, or undertaking the obligation, is generally to be preferred."

## STATEMENT OF THE CASE

The STONE MOUNTAIN MEMORIAL ASSOCIATION was created by acts of the Georgia General Assembly, 1958, Page 61., to operate the STONE MOUNTAIN

MEMORIAL PARK in DeKalb County, Ga. (See Stipulation ,Appendix, page A2). At the time of its creation, it had no "merit system" and its employees were not included in the State of Georgia merit system. Petitioner JOHN HURSTON was employed on January 1, 1965, prior to the establishment of a "merit system" for the employees. Subsequently, during the year of 1966, the General Manager of the STONE MOUNTAIN MEMORIAL PARK notified JOHN HURSTON that STONE MOUNTAIN had adopted a "merit system", effective September 1, 1966 which covered HURSTON and the other employees (Plaintiff's Trial Exhibit No. 1). The "merit system" was contained in the "Personal Policies and Procedures" which were adopted at that time. The Personnel Policies and Procedures included a phrase as follows: "these policies and procedures may be amended by Association resolution." (See Stipulation, Appendix,page A2)

Petitioner DAVID H. MOFFET, JR. was employed on November 8, 1976. At that time the "merit

system" was already in existence and provided, inter alia, as follows:

"6.0 EMPLOYMENT

6.2 Probationary Period: All new employees will be hired for a probationary period of 90 days, during which time he may be separated by the department head, subject to the approval of the General Manager, without cause. Further, at the completion of 90 days' employment, all employees will be given an evaluation by the immediate supervisor. All evaluations will be treated as confidential and will be retained by the Personnel Manager. (See Paragraph 8.0 below.)

6.3 Status: All personnel will be classified in one of three categories. Full-time Permanent; Part-time Permanent; and Part-time . Following is an explanation of each status:

a. Full-time Permanent is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.

b. Part-time Permanent is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours year around or a minimum of 1,440 hours per year.

c. Part - time is an employee, hired on a temporary status who works seasonably or does not normally work a scheduled work week of 28 hours or more year around. Part-time employees are not allowed any fringe benefits. (They are, however, covered by Workmen's Compensation).

13.0 SEPARATION

13.1 General: Unless otherwise provided in this policy, the tenure of a permanent employee shall be during good behavior and satisfactory performance of duties as recorded by his performance evaluations.

13.5 Dismissals; The supervisor or department head, upon notice to an employee stating specific reasons therefor, may dismiss any employee for cause as herein defined. For purpose (sic) of this section, 'cause' for dismissal shall be negligence or inefficiency in performing the duties of the position held, unfitness to perform assigned duties, misconduct, failure to cooperate or insubordination. Such employee may appeal to the General Manager within Ten days after the effective date of dismissal and if the General Manager exonerates such employee from the charges on which his dismissal is based, such employee may be reinstated to the position from which he was dismissed. Provided, however, any em-

> ployee convicted by a court of record of any crime involving moral turpitude when such conviction is final shall have no course to appeal." (See Stipulation, Appendix, page A3 through A5).

In July of 1978 an employee by the name of Barbara Hamilton was discharged , she challenged her discharge, hired an attorney demanded a hearing and was reinstated. (Trial testimony Transcript). This event prompted the STONE MOUNTAIN MEMORIAL ASSOCIATION through its managers and members (Trial Transcript) to revoke and repeal the heart and substance of the merit system in September of 1978 by taking from the employees their job tenure, their right to be appraised of reasons for discharge and their right to a hearing. In lieu of these rights it substituted provisions providing that all employees serve at the discretion of the General Manager. (See Stipulations Appendix, page A6). The revised provisions states as follows:

> "5.3 Status: All personnel will be classified in one of three categories: Full-time; Part-time; and

Temporary. Following is an explanation of each status:

a. Full-time is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.

b. Part-time is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours when averaged over a one year period with a minimum of 1,440 hours per year.

c. Temporary is an employee, hired on a temporary basis who works seasonally or does not normally work a scheduled work week of 28 hours or more year around. Temporary employees are not allowed any fringe benefits.

## 13.0 SEPARATION AND ADVERSE ACTIONS.

13.1 General: All employees serve at the discretion of the General Manager or his designee.

13.3 Adverse Actions: The supervisor or department head, may dismiss, demote, suspend, reduce the salary of or otherwise discipline any employee under his supervision. Upon written request within ten days of the effective date of the

> adverse action, the employee may meet the General Manager or his designee regarding the adverse action."

Approximately one year later, Petitioners MOFFET and HURSTON were discharged, without cause, and denied a hearing when requested. (See Stipulation, Appendix,page A8) STONE MOUNTAIN MEMORIAL ASSOCIATION maintained that because the original "merit system" contained a phrase authorizing amendments, that any rights under the "merit system" as contained in the Personnel Policies and Procedures were subject to being revoked and repealed by amendment without due process of law. The precise language of the Personnel Policies and Procedures relied upon by STONE MOUNTAIN MEMORIAL ASSOCIATION in this regard is as follows: "these policies and procedures may be amended by Association resolution". (See Stipulation, Appendix, page A2).

At the time of discharge all Employee Performance Evaluations of DAVID H. MOFFET, JR. and JOHN HURSTON were satisfactory or better. (See

Stipulation, Appendix, page A10)

After being discharged, Petitioners MOFFET and HURSTON requested a hearing. The request was denied (See Stipulation, Appendix, page A8 ).

Prior to the repeal and revocation of the job security rights of Petitioners and after the Barbara Hamilton incident, George Willis, a Defendant and the General Manager of the park testified that he wanted the tenure provisions deleted and did not wish to be bothered with hearings and appeals (Trial Transcript).

## REASONS FOR GRANTING WRIT OF CERTIORARI

Public employees are entitled to due process in connection with the termination of their employment where they have a liberty or property interest in their employment. Board of Regents v. Roth , 408 U.S. 564, 569 (1972). "To have a property interest and a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." Id. at 577. "Property int-

erests, of course, are not created by the Constitution. Rather, they are created and their demensions are defined by existing rules or understandings that stem from an independent source such as State law -- rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." Id. at 577.

Property right interests are determined by consulting State law but once determined are then subject to the protection and guarantees of the United States Constitution.

There has been no prior adjudication as to whether a property right interest was created by the "merit system" as adopted by the STONE MOUNTAIN MEMORIAL ASSOCIATION, however, a review of cases decided by Georgia Courts involving other merit and civil service systems are analogous. These cases establish the principle that where one has an expectation of continued employment during the satisfactory performance of his job duties (which is granted in this case by a specific

written document the "merit system" ), such amounts to a property right interest. See Dean v. DeKalb Merit Council, 110 Ga. App. 244, 138 S.E. 2d 183 (1965), City of East Point v. Grayson, 109 Ga. App. 413, 136 S.E. 2d, 434; Scott v. Undercofler, 108 Ga. App. 460, 133 S.E. 2d 444.

In case of Thomas Harrison v. Housing Authority of the City of College Park, et al., 445 F Supp. 356, the Court held on February 6, 1978 as follows:

> "1. The first issue before the Court is whether Plaintiff had a sufficient property interest in his continued employment to entitle him to the applicable due process rights of notice and a hearing concerning his termination. 'A persons' interest in a benefit is a property interest for due process procedures if there are...RULES OR MUTUALLY EXPLICIT UNDERSTANDINGS that support his claim of entitlement to the benefit and that he may evoke a hearing. 'Perry v. Sindermann, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972). A property interest is created and defined by source independent of the Constitution. Such sources include State laws, ordinance or an implied contract which secures

> benefits and supports claims of entitlement to those benefits. Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)." (Capitalization added for emphasis)

Additionally, the Georgia Supreme Court in the case of the Brownlee et al. v. Harold E. Williams, 233 Ga. 548, 212 S.E. 2d 359 (1) (1975) held that employees covered by the Fulton County Civil Service System have a property interest in their continued employment. This is the same civil service system as was involved in the case of Fulton County v. Spratlin, 210 Ga. 447 (1954), twnenty-one years earlier. The earlier case, Respondents asserted, authorized revocation of property rights without due process. However, it held a persons "status" may be changed not that a property right may be revoked without due process.

Thus, the STONE MOUNTAIN MEMORIAL ASSOCIATION's execution and promulgation of the "merit system" (which granted tenure to employees during

the satisfactory performance of their job subject to dismissal for cause) granted to them a property right interest as defined by Georgia Law. Once established a property right interest is protected by the Fifth and Fourteenth Amendments of the United States Constitution and may not arbitrarily or capriciously be revoked, repealed or taken away without due process. Board of Regents v. Roth , supra.

The Trial Court in its Order and judgment, which was affirmed per curiam (without written comment) by the Eleventh United States Court of Appeals, stated (See Appendix, page A14) as follows:

> "The Court is convinced that the key issue in this case is whether the STONE MOUNTAIN MEMORIAL ASSOCIATION had the legal right to alter its Personnel Policies and Procedures to change the tenure of permanent employees from during 'good behavior and satisfactory performance' as shown by their written evaluations to serving 'at the discretion of the General Manager.'"

In determining whether the STONE MOUNTAIN MEMORIAL ASSOCIATION had the legal right to alter its Personnel Policies and Procedures the trial court in its Order and judgment stated (See Appendix,page A15,16) as follows:

> "The heart of this issue lies in the meaning to be attached to the word 'amended'. ...Thus, if the term 'amended' is given a narrow scope and if its meaning is restricted to some level of change less than the association's action in September of 1978, Plaintiff may indeed have had property rights in employment that they could not have been deprived of absent due process. If, on the other hand, 'amended' is broad enough to include the association's revision in September of 1978 of the personnel policies, the association retained a 'string' when it instituted a merit system that was paramount to the employees' rights. Instead any rights they had were contingent on the association's not 'amending' them away."

Because the Judgment centered on the word "amend", the meaning and limitation of this word must be determined. The Supreme Court of the United States in the case of Phillips Petroleum

Co., et al., v. Jenkins, 56 S.Ct. 611, 297 U.S. 629, defined the power to amend and its limitations as follows:

> "[2-4] The reservation of a power to amend is a part of a contract between the state and the corporation, and therefore Section 10 of Article I of the Federal Constitution does not apply. The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation or arbitrarily to make alterations that are inconsistent with the scope and object of the charter (635) or to destroy or impair in vested property right. On the other hand, it extends to any alteration or amendment 'which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs.'[6]"
>
> (Footnote No. 6 cited the case of Looker v. Maynard, 179 U.S. 46, 52, 21 S.Ct. 21, 45 L. Ed. 79). (Underlining added for emphasis).

The case of Phillips Petroleum Co., et al., v. Jenkins, supra, has never been reversed and is

controlling on the lower courts as to the interpretation of the word "amend" or "amendment". This case however, does not sit in a vacuum for inferior courts throughout the nation have interpreted the word "amend" in a similar fashion to that adopted by the Supreme Court of the United States.

While there are no Georgia cases directly interpreting the word amend there are two cases which have bearing; either on the word "amend" or the reservation in a contract of such a power.

First, in the case of Eminent Household of Columbian Woodman v. Epps, 24 Ga. App. 762, 102 S.E. 174, the Georgia Court of Appeals held that a fraternal organization which provided insurance coverage could not defeat or abridge the purpose and substantial contractual rights provided by later changing the coverage of insurance. This was held even though there was an expressed statement in the original certificate issued (and which was accepted by the insured) that the

coverage was subject to the law of the fraternal order at the time of contracting or which might thereafter be enacted. In that case the Georgia Court of Appeals held that such a reservation could not be used to "reputiate the main and essential elements of the insurance contemplated in the contract." In the present action STONE MOUNTAIN MEMORIAL ASSOCIATION is asserting the reservation of the right to amend allowed it to repudiate the main and essential elements of the merit system contract which was the right of employees to continued employment during the satisfactory performance of their job duties.

Perhaps the nearest the Georgia Courts have come in case law to providing an interpretation of the word "amend"appears in the case of Ranger Insurance Company v. Columbus Muscogee Aviation, Inc., 30 Ga. App. 742, 240 S.E. 2d 474 in which the court stated as follows:

> "The insured asserts that the use of the words 'amended to read as follows' constitutes an erasure of both of these basic requirements or

> at least creates an ambiguity which should be construed adversly to the insurer. We disagree. Black's Law Dictionary (Fourth Ed.) gives three meanings for the word 'amend': 'To improve. To change for the better by removing defects or faults. To change, correct, revise.' None of these meanings can be stretched to hold that there was an erasure or deletion in the instant policy of the two basic requirements."

The action of the STONE MOUNTAIN MEMORIAL ASSOCIATION in revoking and repealing the heart and substance of the merit system, was an erasure or deletion of the basic elements of the merit system; and thus did not amount to an amendment but amounted to a revocation or repeal prohibited by the aforesaid case law.

Georgia Code §20-704 provides codified rules for interpretaion of contracts in Georgia. Under Subsection (2) it mandates that words in contracts should be given their usual and common meaning. For the lower courts to refuse to give the ususal and common meaning to the word amend but instead to adopt a "broad meaning" so as to defeat the

basic purpose of the merit system denies to Petitioners equal protection and equal application of the law as is guaranteed by Section I of the Fourteenth Amendment of the United States Constitution.

The usual and common definition of the word "amend" as found in Black's Law Dictionary Revised Fourth Edition is as follows:

> "Amend. To improve. To change for the better by removing faults. Cross v. Nee, D.C. Mo, 18 F. Supp., 589, 594. To change, correct, revise. Texas Co. v. Ford, 168 Tenn. 679, 80 S.W. 2d, 658, 660."

> Black's Law Dictionary also defines "amendment" as follows:

> "A change ordinarily for the better. Musher v. Terera, 162 M.d. 44, 158A, 14, 15. An amelioration of the same without involving the idea of any change in the substance of the essence. VanDusen v. Ruth 343 Mo.. 1096, 125 S.W. 2d 1, 3."

Doubleday's Thesaurus In Dictionary Form, published by Doubleday & Company, Inc., Garden City, New York, copyrighted 1977, gives the following meaning to the word "amend":

> "Improve, correct, better, ameliorate, amend, remedy, strengthen, restore, redeem, revive, doctor, rectify, reform."

Doubleday gives the antonyms of the word "amend" as follows:

> "Worsen, weaken, dilute, debase."

Webster's Seventh New Collegiate Dictionary defines the word "amend" as follows:

> "1: To put right; specif; to make emendations in. 2a: To change or modify for the better; improve. b: to alter esp. in phraseology; specif; to alter formally by modification, deltion or addition synonymn see correct."

The Courts of various states throughout the United States have had a occasion to define the limits of the word "amend". In the case of Greenville Community Corp. v. Alexander Smith, 95 S.E. 2d 262, 265, (1956), the word "amendment" was defined in Headnote 3. as follows:

> "The term 'amendment' by very definition connotes alteration, improvement or correction, and thus negates the idea of destruction or elimination of the original."

The word "amend" was defined in the case of Couch v. Southern Methodist University, Tex. 290 S.W. 256, 260, and in that case the Court stated as follows:

> "[6] The phrase 'to amend' is not synonomous with the phrase 'to abrogate or destroy'. Its snyonyms are 'to improve'; 'to reform'. In ordinary usage, the meaning of the word given by lexicographers is: 'The act of freeing from fault; the act of making better, or of changing for the better; correction, improvement.' Sixth Century Dictionary."

The permanent edition of Words and Phrases, Volume 3, published by West Publishing Company gives numerous cases in which the term "amendment" has been interpreted, several of which are applicable in this instance and are quoted as follows:

> "The word 'amendment' of a Statute is an alteration or change, and an amendment keeps alive while a 'repeal' destroys. State ex Rel Strutz v. Baker, 299 N.W. 574, 578, 71 N.D. 153."

> "Amendment' of a statute implies its survival and not destruction. City of Ensley v. Simpson, 52 So. 61, 63, 166 Ala. 366; Robinson v. City of Ensley, Ala. 52 So. 69."

> "The term 'amendment' implies such an additon or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed. State ex Rel Foster v. Evatt, 56 N.E. 2d 256, 282, 144 Ohio St. 65."

The Trial Court erred in failing to follow the Georgia Code 20-704 (2) and (5) which Petitioners assert, mandates that the usual and common meaning of words be applied as they are used in contracts and if an ambiguity exist it should have been resolved in Petitioners' favor.

A limitation on the right to amend was established by the United States Supreme Court in the case of Phillips Petroleum Co., et al., v. Jenkins, supra. The Trial Court, and the Eleventh United States Circuit Court of Appeals by its affirmation of the Trial Court rule in per curiam, erred by failing apply the limits of the word amend as determined by the United States Supreme Court.

It should be pointed out that the Respondents did not attempt to define "amend" in any of its arguments but it did not adopt the interpretation of the word "amend" as was stated by Petitioners in their briefs before the Court. However, the Respondents did contend that the reservation of the right to "amend" authorized the revoking of the tenure and employment rights granted by the merit system.

Respondents also argued that under Georgia law (Spratlin v. Fulton County, supra), a property right interest, such as existing under the merit system, is subject to being revoked by the appointing authority even without a reservation of the right to do so and without due process of law. Such argument ignores the fact that a property right interest may be defined by State Law but, once established, is protected by Section I, of the Fourteenth Amendment to the United States Constitution. Georgia law may not defeat a

person's Constitutional rights. The case which Respondents STONE MOUNTAIN MEMORIAL ASSOCIATION relied upon in support of their contention that a property right interest once conveyed under a merit system may be revoked without due process of law was Spratlin v. Fulton County, supra. That case was misapplied. It did not hold that a property right interest may be revoked without due process but merely that one's "status"under the law may be changed by later legislation. It is interesting to note that the very same merit system or civil service act involved in that particular case was twenty-one years later, in the case of Brownlee et al. v. Harold E. Williams, 233 Ga. 548, 212 S.E. 2d 359 (1)(1975), held have conveyed a property right interest to employees in their expectation of continued employment.

The Trial Court Judge determined that this entire case hinged on the interpretation of the word "amend" and indicated there was some question of its meaning. Under such circumstances, if it

were determined that the meaning of the word "amend' or"amendment" as appeared in a original merit system was ambiguous, Georgia Code, on interpretation of contracts, §20-704(5) mandates that the interpretation most favorable to Petitioners MOFFET and HURSTON must be applied in that it was the STONE MOUNTAIN MEMORIAL ASSOCIATION who undertook the obligation of providing tenure and job security and who executed and established the written merit system for its employees. Ga. Code 20-705 (5) states:

> "5. If the construction is doubtful, that which goes more strongly against the party executing the instrument, or undertaking the obligation, is generally to be preferred."

The Trial Court also in its judgment made the erroneous statement "the testimony by association members at trial supports the Court's conclusion that the association intended to reserve the power to change the personnel policies as it did in 1978, ...". Such a statement is totally un-

supported by the trial record. There was no testimony by any person who was an association member in 1966 when the merit system of Personnel Policies and Procedures were adopted. The association members who testified were not members at that time and did not testify about the intention of the association in 1966 at the time it enacted the merit system agreement with its employees. Some of the members did tesfity that when they, in September of 1978, revoked the rights of employees to continued employment during the satisfactory performance of their job duties, they intended to do just that and to make employment subject to the will of the General Manager, but even these people did not testify what the original association members intended at the time they adopted the merit system. Thus there is absolutely no evidence to support the Court's conclusion that the association intended at the time it adopted the merit system, to reserve the power to change the personnel policies as it did.

## CONCLUSION

Certiorari should be granted because the judgment of the trial court, affirmed per curiam (without written comment) by the Eleventh United States Circuit Court of Appeals, is in conflict with the decision of the United States Supreme Court Phillips Petroleum Co. et al., v. Jenkins, supra, which defines the limits applicable to a reservation of the right to amend. A Writ of Certiorari should issue in order that the Supreme Court can review the lower courts' actions and non-application of limits to be applied to Amendments.

Further, the broad interpretation of the word "amend" as applied by the Trial Court Judge was not authorized by Georgia Law in that Georgia Code §20-704 defines how contracts are to be interpreted. This code section was not followed by the Trial Court Judge nor was it applied by the United States Circuit Court of Appeals of the Eleventh Circuit who affirmed the Trial Court

Judge per curiam (without written comment). Because of this the Supreme Court should exercise its power of supervision as contemplated by Rule 19.

Petitioners had a property right interest in their expectation to continued employment under the Personnel Policies and Procedures "Merit System" executed and adopted by the STONE MOUNTAIN MEMORIAL ASSOCIATION. This property right interest vested and having vested is subject to the protection guaranteed by the Fourteenth Amendment of the United States Constitution. The taking away of this property right interest, without due process of law, by "amendment" does violence to Petitioners constitutional rights and the Supreme Court should assert its power to prevent the denial of Petitioners constitutional right to due process.

Additionally, equal protection of the laws, as guaranteed by Section I of the Fourteenth Amendment of the United States Constitution, was

denied Petitioners in that Petitioners established at trial that Barbara Hamilton had been given the opportunity of a hearing following discharge and this was denied to Petitioners.

Petitioners respectfully pray that a Writ of Certiorari issue and Petitioners constitutional rights be protected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Petition for Certiorari have been served on the Honorable Michael J. Bowers, Attorney General of the State of Georgia, Respondents Counsel, by depositing same in the United States Mail, with adequate postage thereon and addressed as follows:

Michael J. Bowers, Esq.
Attorney General,
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dated this 24th day of June, 1982.

FLETCHER THOMPSON
Attorney for Petitioners